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No. 80-1924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR W. WEINBERGER, *et al.*, *Petitioners*,

v.

ANTHONY M. ROSSI, *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia

MOTION FOR LEAVE TO FILE AND BRIEF AS AMICUS CURIAE OF THE HONORABLE WILLIAM V. CHAPPELL, JR., DAN DANIEL, PAUL S. TRIBLE, JR. AND G. WILLIAM WHITEHURST, MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

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January 11, 1982

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MOTION TO FILE BRIEF AS AMICUS CURIAE OF THE HONORABLE WILLIAM V. CHAPPELL, JR., DAN DANIEL, PAUL S. TRIBLE, JR. AND G. WILLIAM WHITEHURST, MEMBERS OF CONGRESS

Pursuant to Rule 36.3 of the Rules of this Court, the above-named Members of Congress hereby move the Court for leave to file a brief as *amicus curiae*, submitted herewith, in support of Respondents in this case.

The Members of Congress who seek leave to file as *amici curiae* have directly participated, as members of committees and subcommittees on armed services, appropriations and defense, in the oversight of military authorizations and appropriations and in the making of Rules for the Government and Regulation of the land and naval forces, as is their constitutional duty.

In the performance of that duty, *amici* have considered the practice of the Department of Defense of reserving employment positions at U.S. military facilities overseas and the discrimina-

tion against U.S. citizens and dependents of U.S. personnel which results from the practice. *Amici* believe they are in a unique position to bring to the attention of the Court their continued opposition to that practice, a practice which Congress sought substantially to eliminate through legislation in 1971.

In addition, *amici* are elected representatives of the public and as such are charged with securing the redress of public grievances against the Government. This duty can be discharged through an appearance as *amici curiae* before this Court.

Amici are aware of the positions heretofore taken by the parties to this case and submit that the position taken by the Government (Petitioners) raises questions of fact which *amici*, as Members of Congress, can most appropriately address.

First, the Government contends that the word "treaty" in Section 106 of Public Law No. 92-129 should be construed broadly so as to encompass executive agreements. The effect of such a construction is, of course, to exempt from the prohibition against discrimination otherwise effected by Section 106 the discriminatory practices existing at U.S. facilities in a large number of countries, including the Philippines. The Court of Appeals below correctly rejected such a construction, and *amici* wish to reinforce to the Court a seemingly obvious point: the Members of Congress sought by Section 106 to achieve a purpose, beneficial to the aggrieved members of the public, which purpose cannot possibly be achieved or even partially effectuated if the Government's position is adopted by the Court.

Secondly, *amici* believe they are best situated to answer the Government's contention (Petitioner's Brief at 40-45) that Congress has "acquiesced" in the Government's preferential hiring practices since the passage of Section 106 in 1971. This acquiescence is allegedly manifested through Congressional si-

lence in the face of the Executive Branch's execution of five executive agreements since 1971 which provide for preferential hiring of local nationals. On this point the Government is mistaken, and *amici* are uniquely in a position to demonstrate that error. As detailed in *amici's* brief, Congress has since 1971 affirmatively expressed its continued opposition to the Government's discrimination against U.S. citizens and dependents in filling employment positions at U.S. bases overseas. The House of Representatives expressed that opposition as recently as December, 1981, and *amici* wish the Court to be fully aware of that fact.

Amici do not believe that this matter of alleged Congressional acquiescence has been fully explored in the pleadings thus far submitted to the Court. In fact, Congress has not retreated from the anti-discrimination position articulated in Section 106. *Amici* believe that, in order to ensure that the Court is fully apprised of the continued Congressional opposition to the hiring practices in question, they should be allowed to do so by filing a brief as *amici curiae* in this case. The questions discussed above and in *amici's* brief are clearly relevant to the disposition of the case; the construction of "treaty" in Section 106 and the understanding of the legislation in the context of ongoing Congressional policy are of critical importance to the resolution of the issues in this proceeding.

WHEREFORE, *amici curiae* respectfully request that their motion be granted.

Respectfully submitted,

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January 11, 1982

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BRIEF AS AMICUS CURIAE OF SEVERAL MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The amici have participated in the oversight of military authorization and appropriations, including civilian personnel practices at overseas bases, as Members of Congress charged by the United States Constitution with the responsibility to "provide for the common Defence" (article I, section 8, cl. 1), to "declare War" (*id.*, cl. 11), to "raise and support Armies" (*id.*, cl. 12), to "provide and maintain a Navy" (*id.*, cl. 13): to "make Rules for the Government and Regulation of the land and naval Forces" (*id.*, cl. 14), and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ." *Id.*, cl. 18. The amici have considered the continued practice of reserving certain overseas jobs at our bases for "local nationals" as an unacceptable practice, and

have, in the exercise of their constitutional powers and responsibilities, sought the implementation of the statute which Congress enacted to prohibit such practices. Pub. L. No. 92-129, §106, 85 Stat. 355, 5 U.S.C. § 7201 note (Supp. III). Section 106, enacted as part of the Military Selective Service Act Amendments of 1971, provides:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

Amici are in full support of the decision of the Court of Appeals and would like to take this opportunity to urge this Court to affirm that decision.

SUMMARY OF ARGUMENT

The problems of U.S. servicemen called upon to serve extended periods of time in distant areas of the world need no great elbaboration here. The hardship on the families of these people, particularly in the enlisted ranks, has been acute. Senator Schweiker noted in the debates that preceeded the enactment of Public Law No. 92-129:

> Not only do we treat our GI's as the very bottom of the ladder, but also we treat their dependents the same way. How can we expect people to volunteer when we treat them this way?[1]

These concerns led to the enactment by Congress of a law which provided that "the Department of Defense cannot discri-

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[1] 117 CONG. REC. 14394 (1971).

minate against American citizens or their dependents in employment on military bases." S. REP. NO. 92-93, 92d Cong., 1st Sess. 23 (1971).

By an elaborate interpretation of the narrow exceptions Congress included in this prohibition, the Executive Branch has substantially nullified the purpose of the law. Amici urge this Court to end this perpetuation of the very conditions we in Congress sought to alleviate in 1971.

By our oversight and appropriations powers, since 1971 we in Congress have consistently reiterated our view that preferential employment of local nationals by the United States Government should be terminated as expeditiously as possible. *See, e.g.*, H.R. REP. No. 97-410, 97th Cong., 1st Sess. 54 (1981). These pleas have not been heeded by the Department of Defense. The failure of the Executive Branch to honor the purpose of Public Law No. 92-129 remains the major barrier to greater employment opportunities for U.S. citizens and their dependents at these facilities.

If anything, over the past ten years the hardships on U.S. servicemen and their families have grown, as has the need to reduce these hardships. Thus, the rationale supporting the remedial objectives of Public Law No. 92-129 is as strong, if not stronger, today as it was when the act was passed in 1971.

ARGUMENT

I. Congress Sought To Increase Hiring of U.S. Citizens And Dependents By Passage of Public Law No. 92-129, Section 106.

When Senator Schweiker introduced this bill in 1971, he commented that "our GI's [are] below just about every conceivable [poverty] index we have in this society."[2] He noted that

[2] *Id.* at 14394. *See id.* at 16123.

this "bottom of the ladder" tretment of GI's extended to their dependents as well. [3] Putting an end to the hardship imposed by restrictive hiring or dependents was at the heart of the amendment offered by Senator Hughes and Senator Schweiker. [4]

Amici are concerned that the unduly narrow view of the Government (Petitioners' Brief at 34-40) glosses over the essential fact that we in Congress intended this law to do something. Senator Schweiker noted that the problem was to stop discrimination against our citizens and their wives. He referred to GI complaints that "[t]hey could not get their wives jobs at the local exchange service." [5] Senator Hughes noted at the time that the end of the draft was contingent on improved pay and "adequate concern and care for the dependents. . . ." [6]

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[3] *Id.* at 14394.

[4] *See* Conference Committee Report, H.R. REP. NO. 92-433, 92nd Cong., 1st Sess. 31 (1971).

[5] 117 CONG. REC. 14397 (1971). "We have tried to discriminate against our own citizens and their wives in a manner that I could not imagine any country in the world doing." *Id.* A letter from an enlisted serviceman read into the *Congressional Record* by Senator Hughes capsulized the problem presented to Congress:

> My wife has a degree in nursing from an accredited college . . . But she can not work in an American hospital to help meet the high cost of living here in Germany. The Government would rather hire German people to run the wards, the food service, and many [other] services. . . . Why can't American people work in these places and try to help relieve the economic stress on the lower ranking enlisted men?
>
> * * * *
>
> The Government could give German laborers the door and hire Americans instead for jobs instead of giving the Germans preference.

Id. at 16125.

[6] *Id.* at 14396. Senator Schweiker also noted that the transition to the all-volunteer army depended on "higher pay rates, and *better* military incentives. . . ." *Id.* at 16121 (emphasis added).

The problem was identified as extending to "the Orient, Europe and around the world" by Senator Hughes when he noted:

> It is not isolated in any one region. The lower ranking military personnel of our Armed Forces have literally been left out. [T]housands live at the poverty level. They are not allowed to work even in the countries where they are forced to live. This is true in spite of the training they have had academically and their qualifications professionally.
>
> * * * *
>
> Those in the lowest ranks cannot have their wives obtain anything but a tourist visa. They are disqualified from helping themselves. And *they are denied the opportunity to work on overseas bases, by agreement with the countries in which they are located,* and are forced to live in poverty. Others must leave their wives at home and endure the agony of separation for long months, and perhaps even years. . . .[7]

Senator Schweiker added to this last point when he criticized the fact that servicemen "do not even have the right to have their wives working there because we . . . give those jobs to German nationals."[8] He later read another article into the *Congressional Record* which further detailed the discriminatory practices:

> Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. *These jobs are classified as local national jobs and American dependents cannot fill the jobs because of this classification.*[9]

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[7] *Id.* at 16126. (emphasis added). The Government's attempt to explain away this passage's reference to denial of jobs at the overseas base pursuant to "agreements" (Petitioners' Brief at 40) simply makes no sense.

[8] *Id.* at 16128.

[9] *Id.* at 16132 (emphasis added). The classification of jobs as "local national" was done under a German interpretation of the NATO Status of Forces Agreement, not by General Phipps' memorandum cited by the Petitioner as the sole evil addressed by the legislation.

By enacting the amendment offered by Senator Schweiker and Senator Hughes, Congress felt it was providing that GI's and their dependents "will not be discriminated against" in this fashion. [10] The objective of the discrimination prohibition was to provide more jobs to dependents to ease the financial and psychological stress of U.S. military families overseas. [11]

II. This Court Should Construe Public Law No. 92-129, Section 106, To Achieve The Remedial Purpose Intended By Congress

This Court has consistently recognized that "remedial legislation . . . is to be construed generously to further its primary purpose." *Gomez* v. *Toledo*, 446 U.S. 639, 639 (1980). [12] The purpose of the 1971 legislation was indisputably to facilitate the employment of U.S. citizens and their dependents at U.S. bases overseas. "The will of Congress would be thwarted" if the Petitioners' narrow view of Secton 106 were adopted. [13] *See* Court of Appeals' decision, 642 F.2d at 560 & 561.

The simple fact never addressed by the Government's brief is that its interpretation of the amendment sponsored by Senator Schweiker and Senator Hughes would totally frustrate the pronouncements of Congress on the purpose of the provision. Apparently, not a single wife of an enlisted serviceman would get a nursing job at a hospital at Subic Bay Naval Station or a

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[10] *Id.* at 16133.

[11] The single case of a local commander encouraging recruitment of local nationals had already been cured. *Id.*

[12] *See, e.g., Peton* v. *Rowe*, 391 U.S. 62, 65 (1968) ("remedial statutes should be liberally construed"); *Tcherepnin* v. *Knight*, 389 U.S. 333, 336 (1967) ("remedial legislation should be construed broadly to effectuate its purposes"); *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 531, 533 (1967) ("language] which is remedial [is] . . . to be liberally construed"), *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 388, 389 (1959) ("remedial legislation of a regulatory nature" should not be strictly construed).

[13] *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26 (1957).

post exchange clerk position at Rhine-Main Air Force Base under the interpretation suggested by the Executive Branch. The sole accomplishment of the statute under this view would be to prohibit "*future* actions by individual Department of Defense commanders." Petitioners' Brief at 40.

This self-defeating construction of the provision should be avoided by this Court if the intent of Congress in 1971 and our concern in Congress since 1971 is to be honored by the Judicial Branch.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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